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July 1, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Erratum-Comments of the Business Software Alliance, WT Docket No. 96-198

Dear Ms. Salas:

On Tuesday, June 30, 1998, we filed Comments in WT Docket No. 96-198 on behalf of the Business Software Alliance. We are enclosing a substitute version of those Comments to correct an error in the numbering of the footnotes. The correction to the footnote numbering in no way affects the substance of the Comments. Please substitute the enclosed document for the document that we filed yesterday.

Should there be any questions concerning this matter, please contact the undersigned.

Sincerely,

Laurel E. Miller

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 255 of the	)	
Telecommunications Act of 1996	)	
	)	WT Docket No. 96-198
Access to Telecommunications Services,	)	
Telecommunications Equipment, and	)	
Customer Premises Equipment	)	
By Persons with Disabilities	)	

To: The Commission

COMMENTS OF THE BUSINESS SOFTWARE ALLIANCE

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June 30, 1998

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To: The Commission

COMMENTS OF THE BUSINESS SOFTWARE ALLIANCE

INTRODUCTION AND SUMMARY

The Business Software Alliance ("BSA") believes that it is an important goal to extend the benefits of the information age to everyone, including persons with disabilities. BSA member companies, which include the leading software publishers, have developed and offered products specially adapted to meet the needs of persons with disabilities.[1] However, because BSA member companies are not primarily engaged in the types of activities Congress intended Section 255 of the Communications Act, 47

[1] BSA promotes the continued growth of the computer software industry through its international enforcement, education, and public policy programs. On behalf of the companies producing personal computer and client server software, BSA operates public policy, education, and enforcement programs in scores of countries, including the United States. BSA's Policy Council, which guides BSA's participation in regulatory policy debates in the United States, comprises the following leading software and computer technology companies: Adobe Systems, Inc.; Apple Computer, Inc.; Autodesk, Inc.; Bentley Systems, Inc.; Compaq Computer Corp.; IBM/Lotus Development Corp.; Intel Corp.; Intuit; Microsoft Corporation; Novell, Inc.; Sybase, Inc.; and Symantic Corporation.

U.S.C. § 255, to cover, BSA submits these comments in the above-captioned proceeding to ensure that the Commission does not inadvertently cover activity beyond what Congress intended.

BSA member companies develop and sell personal computers ("PCs") and related software and services that enable consumers to use PCs and to access the Internet. Products sold by BSA member companies are not subject to regulation by the Commission because they are not "telecommunications equipment" as defined by Congress. Moreover, no BSA member company is in the business of providing telecommunications services, While we all desire access to the Internet and PC-based services for everyone, by limiting Section 255 to telecommunications services and equipment, Congress made it plain that it was not using legislation to address that goal. Indeed, it would have been premature for Congress to have done so. The Internet and consumer computer services are only now – at this instant in time – reaching mass market proportions. It is still unclear whether the Internet market will fail to reach out to persons with disabilities. In fact, all indications are that industry solutions are attainable. The Commission should be aware that outside of the telecommunications world, companies such as Microsoft, IBM, Digital Equipment Corporation and others have taken strides to develop products to meet the needs of persons with disabilities. In addition, the World Wide Web Consortium has launched a "Web Accessibility Initiative" to improve usability for *all* persons who access the Web. This research and development activity has been undertaken without government mandates.

Telecommunications accessibility has been a more longstanding issue, which the Telecommunications Act of 1996 (the "1996 Act") sought to remedy.

Specifically, Congress directed the creation of guidelines to assist the telecommunications industry in complying with Section 255. In proposing rules or guidelines to implement this section, BSA commends the Commission for proceeding carefully and staying within its jurisdictional limits. The Commission correctly concluded in the Notice of Proposed Rulemaking ("NPRM") that the problem Congress sought to remedy involves "telecommunications equipment" and "telecommunications services" and does not include voicemail or electronic mail, which are "information services." BSA also agrees with the Commission's conclusion in the NPRM that Section 255 does not apply to software that is marketed separately from equipment, nor does it apply to software providers. The language of Section 255 manifests Congress's intent that the Commission tread cautiously into the realm of equipment and service design. The NPRM tracks that intent. In the same vein, BSA urges the Commission to adopt guidelines that are flexible and complaint resolution procedures that are practical and even-handed.

I. BSA MEMBER COMPANIES HAVE DEVELOPED AND DO OFFER INNOVATIVE PRODUCTS TO ENSURE ACCESSIBILITY.

The concrete actions of BSA members evidence their commitment to ensuring accessibility of their products. Importantly, these efforts to innovate solutions to suit the special needs of persons with disabilities and to respond to the suggestions of advocates for such persons have been made in the absence of government regulations. Instead, these efforts have been driven by market demands, and by the belief of BSA

member companies in the importance of extending the benefits of their products to everyone. Examples of BSA members' efforts to ensure accessibility include:

- **Microsoft Corporation's "Active Accessibility".** For several years, Microsoft has incorporated basic accessibility features into its operating systems. One of Microsoft's most important recent initiatives to improve the accessibility of Microsoft's own applications and software in general is Active Accessibility ("MSAA"), first released in May 1997. MSAA is a suite of technologies that enables applications and operating systems to cooperate effectively with accessibility aids. MSAA for the first time solves certain vexing problems of compatibility between software and accessibility aids. Over 20 accessibility software vendors support MSAA or are committed to doing so. MSAA is supported on Windows 95 and Windows 98, and – as a sign of progress in the company's accessibility efforts – is to be built into Windows NT 5.0.

- **Promoting Accessibility Through Microsoft's "Logo" Program.** One of Microsoft's goals is to promote accessible design to the entire computer industry. One way in which the company is pursuing that goal is through the "Designed for Windows NT" and "Designed for Windows 98" Logo programs, which allow software vendors to earn the right to use the "designed for" logo on their marketing materials. Microsoft's Logo Handbook contains requirements that software must meet in order to earn the logo, and tips on how to meet those requirements. Compliance with the requirements is verified by an independent testing organization. In July 1996, accessibility

recommendations were introduced into the Handbook, and in May 1997 the four most important recommendations were converted into requirements. See http://microsoft.com/enable; see *also* http://microsoft.com/msdn/news/devnews/mayjun98/earning.htm.

- **IBM's Speech Recognition Software.** For over 25 years, IBM has been actively involved in research and development of speech recognition software that make it possible for persons with various types of disabilities to use computers. This month, IBM released ViaVoice 98, the next generation of its moderately-priced speech recognition software. ViaVoice 98 includes such innovative features as 'natural language commands,' which allow users to create, edit, and format documents in Microsoft Word 97 by using any of thousands of variations of computer commands; hands-free correction and editing, which enables users to employ voice commands to make corrections and deletions during the course of dictation; and an active vocabulary of 128,000 words, which can be increased by adding subject and industry-specific vocabularies.
- **IBM's Java Accessibility Initiative.** IBM, in collaboration with Sun Microsystems, has been engaged in a significant effort to build accessibility architecture into the Java programming language. With that architecture now in place, IBM is working to encourage software developers to exploit Java accessibility technology. For example, IBM has published Guidelines for Writing Accessible Applications Using 100% Pure Java, which assist application developers in creating solutions suited to the needs of persons with

disabilities when they write programs in Java. IBM also is working to exploit Java accessibility technology itself, and, for example, last October released the first screen reading software built using Java.

- **Digital DECtalk Speech Synthesis.** Digital Equipment Corp. (now Compaq) has developed speech synthesis technology, "DECtalk", that can be integrated into various products in order to provide text-to-speech capabilities. Use of DECtalk technology produces natural sounding, intelligible speech, with personalized voices, variable speaking rates, and multiple user controls. This technology is useful for persons who are blind, have low vision, or who have learning disabilities.

These examples, which have been achieved through years and millions of dollars of effort, demonstrate that the software industry is quite able to respond to the needs of persons with disabilities.

II. BSA STRONGLY SUPPORTS THE COMMISSION'S TENTATIVE CONCLUSION THAT SECTION 255 APPLIES TO BASIC TELECOMMUNICATIONS SERVICES ONLY.

BSA strongly supports the Commission's tentative conclusion that Section 255 does not apply to "enhanced services" or "information services," but rather applies to "telecommunications services" only. NPRM at ¶ 42. For more than two decades, the Commission has been careful and deliberate to draw a line between basic telecommunications services and enhanced services. In writing the definition of these terms in the 1996 Act, Congress essentially codified the Commission's carefully-drawn line and separated all non-basic, non-regulated services under the heading of

"information services." 47 U.S.C. §153(20). The Commission recognized again in its recent report to Congress on funding for universal service the continued vitality of the distinction between basic telecommunications service and other services, such as enhanced services, that are not regulated by the Communications Act. See Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45 (released April 10, 1998). Because Section 255 expressly applies to "telecommunications service" only, see 47 U.S.C. § 255(a), the Commission rightly concluded that voicemail, electronic mail, and other information services are beyond the scope of the Commission's authority.

The Commission has solicited comment on whether Section 255 should be interpreted to apply to new services such as voice mail and electronic mail that do not fall within the definition of telecommunications services. BSA believes that Congress has answered that question for the Commission by not including "information services" within the parameters of Section 255. While BSA member companies are working to make electronic mail and similar services accessible to everyone, the Commission must acknowledge that Section 255 does not contain authority for the Commission to expand its reach beyond "telecommunications service."

In addition, any effort to broaden the category of services covered by the Commission's rules would be wholly impracticable and contrary to the public interest. For example, applying Section 255 to electronic mail in a manner that is fair to all manufacturers and service providers involved in making electronic mail available (including companies providing software, routers, keyboards, monitors, and other attendant hardware) would sweep in such a broad range of activity that it would result in

a gross expansion of the Commission's regulatory authority. Both Congress and various Commissioners have argued in recent years that the "FCC" should not become the "Federal Computer Commission." BSA urges the Commission to stick with its precedent and avoid becoming enmeshed in the hardware and software of computer networks.

III. THE COMMISSION CORRECTLY CONCLUDED THAT SECTION 255 DOES NOT APPLY TO SOFTWARE MARKETED SEPARATELY FROM EOUIPMENT, OR TO SOFTWARE PROVIDERS.

BSA strongly supports the Commission's conclusion that software marketed separately from CPE would not be subject to Section 255. NPRM at ¶ 56. This conclusion is critical to maintaining the appropriate statutory limits of Section 255, as well as to keeping the explosive growth of the PC and software industry unentangled from government rules. The Commission has also correctly determined that software manufacturers would not be directly subject to Section 255 for software bundled with other manufacturers' CPE. The Commission reached these conclusions because it recognized that the Communications Act and the 1996 Act do not give the Commission authority directly over software and software providers.

In analyzing whether Section 255 applies to software, the starting point is the definition of "telecommunications equipment," which contains two important provisions: (1) it explicitly excludes customer premises equipment ("CPE"); and (2) it includes "software integral to such equipment." 47 U.S.C. §153(45). Thus, this definition means that software that is "integral" to the operation of ***network*** equipment falls within the definition of "telecommunications equipment." Consequently, BSA does not disagree with the Cornmission's tentative conclusion that software is subject to

Section 255 when it is an essential part of network equipment and it performs telecommunications functions.

However, the Commission's authority under Section 255 to reach software when it is "bundled" with CPE is questionable. See NPRM at ¶ 56. As the Commission recognizes, Congress chose not to incorporate software into the definition of CPE, though it chose to include software in the definition of telecommunications equipment. Assuming for the sake of argument that the Commission's authority can be extended to software bundled with CPE, BSA would urge only that the Commission be precise in articulating the dividing line between CPE manufacturer software that is covered and that which is not covered by Section 255. The Commission's articulation should clearly reflect the requirement that the only CPE manufacturer software subject to Section 255 would be that which is integral to the performance of telecommunications functions. Thus, the Commission's CPE requirement would mirror the requirement for network equipment.

The Commission should be similarly precise in articulating how software issues should be addressed. The NPRM suggests that, "[t]o the extent the software detracts from or otherwise reduces the accessibility of the product, the manufacturer would be required to alter the software to cure the accessibility problem, to the extent such alteration is readily achievable." NPRM at ¶ 56. The Commission should make clear that "altering" the software entails updating it and not disabling it. The Commission's guidelines should not threaten to undo software advances that push overall telecommunications capabilities forward. Rather, by "updating" software, manufacturers can accommodate accessibility issues that arise while preserving other functionality.

IV. THE COMMISSION SHOULD CONSIDER THE HIGHLY COMPETITIVE NATURE OF THE INFORMATION TECHNOLOGY AND THE TELECOMMUNICATIONS EQUIPMENT INDUSTRIES IN DEVELOPING ITS 'READILY ACHIEVABLE' ANALYSIS.

While BSA member companies are not primarily engaged in telecommunications businesses, they do assist those businesses in implementing software solutions. BSA therefore appreciates the importance to those businesses of flexible and practical implementation of Section 255 by the Commission. Consequently, BSA agrees in principle with the Commission's tentative decision to adopt a three-part framework for analyzing whether a particular telecommunications accessibility feature is readily achievable, focusing on feasibility, expense, and practicality.

With respect to practicality, which the Commission has tentatively concluded should be measured in light of the expenses involved (NPRM at ¶106), BSA urges the Commission to consider carefully how it will weigh corporate resources in its analysis. Specifically, the Commission should recognize that the size of a corporation often does not provide a good proxy for measuring a corporation's ability to afford the development and provision of particular accessibility features. In the extremely competitive information technology and telecommunications equipment industries, profit margins generally are very thin. Large companies, therefore, often are not better situated than small companies to absorb the expenses associated with accessibility. Any assumption to the contrary would grant an unfair competitive advantage to small companies. Moreover, any scaling of the obligations according to corporate revenues would be arbitrary. A scaling of obligations also would be harmful to the purpose of

Section 255 by, among other things, depriving persons with disabilities of the innovations and talent that reside in small companies.

Another factor the Commission should consider in assessing "readily achievable" is the organization of the corporate entity that is responsible for manufacturing the product. Many corporations are now organized along product lines with a subsidiary or division responsible for its own profit and loss depending on the cost and performance of that division's product. The Commission should recognize the reality of the modem corporate structure in assessing whether an entity has the resources to meet the standard of "readily achievable." If a division or subsidiary is responsible for developing and manufacturing a product, then the Commission should analyze whether that division or subsidiary has the financial resources to adopt a particular device. The test should not be whether the parent corporation has resources, because that analysis would ignore the fundamental nature of competitive corporations in the world economy.

V. THE COMMISSION SHOULD ADOPT PRACTICAL AND FOCUSED COMPLAINT PROCEDURES.

BSA supports the Commission's tentative conclusion, based on the plain language of Section 255, that it has exclusive jurisdiction to consider complaints filed under Section 255. BSA believes that current FCC complaint procedures are adequate for Section 255 matters, though with some modifications. In writing specific procedures for Section 255 complaints we offer the following comments:

- ***"Fast-track" complaint procedures are sensible.*** NPRM at ¶¶126-143. BSA generally agrees with the need for prompt resolution of disputes using informal procedures. However, administrative ease and efficiency

must serve the needs of all parties, not just complainants. Since many of the companies receiving complaints may not have FCC counsel who are prepared to respond quickly to such complaints, BSA urges the Cornmission to allow for a longer response time. A response period of 30 days, such as the Commission provides for informal complaints, would be appropriate.

- ***No standing requirement*** **for** ***complainants is*** *deeply flawed.* This proposal could invite frivolous complaints by persons who do not have a legitimate interest in the outcome of a dispute. A complainant should have to show some injury or tangible harm that would be remedied by successful resolution of the complaint.
- ***No time limit for*** *filing* ***a complaint is unfair and unreasonable.*** Although money damages may be limited to complaints filed within two years from the time the cause of action accrues, NPRM at ¶ 149, this proposal is misguided. A time limit is important to give companies certainty as to their exposure to being hauled before the Commission for a Communications Act violation. It is unreasonable for the Commission to impose no time limit for complaints against a fast-changing industry. Indeed, the nature of the industry argues for a 6- to 12-month time limit for complaints.
- ***Alternative Dispute Resolution procedures are worthwhile.*** BSA members generally support ADR procedures. However, ADR should be used to facilitate resolution of disputes and not as another chance for forum

shopping. Thus, the Commission should require a party to request ADR within 60 days of filing a complaint, and if agreed to by both parties then the parties should be foreclosed from other Commission processes.

- ***Burden of proof on "readily achievable" issue should be with provider.***
  - The Commission tentatively concludes that the manufacturer or service provider has the burden of making a "readily achievable" defense once inaccessibility is shown. NPRM at ¶ 162-163. We have no objection to this approach, though a party should be able to demonstrate that a product is not "readily achievable" without having to submit expensive and proprietary design and development information.
  - The Commission tentatively concludes that it will give weight to "good faith" efforts to comply in evaluating a manufacturer's or service provider's "readily achievable" defense. NPRM at ¶164- 167. BSA supports use of the measures described in the Access Board guidelines, because they are useful indicators of "good faith" efforts to comply with Section 255. However, the list should not preclude a company from identifying other steps taken in good faith to comply.
- ***Commission should interpret Access Board Guidelines flexibly in adjudicating complaints.*** BSA members agree with the Commission's tentative conclusion that it has discretion regarding its use of the Access Board's guidelines in implementing Section 255. NPRM at ¶ 30. More specifically, BSA members believe that the Commission, in exercising its

adjudicative authority under Section 255, should interpret those guidelines flexibly and on a case-by-case basis so that the guidelines are applied sensibly to particular types of providers. The Commission should use the guidelines as a relevant factor, ***i.e.,*** a list of useful functions, in adjudicating Section 255 complaints. However, the Access Board guidelines should not be determinative of compliance with Section 255, because some of the guidelines are mutually exclusive, and if viewed as comprehensive, the guidelines would discourage innovation.

- ***Commission can not assess damages against non-carriers. The*** Commission seeks comment on whether it can assess damages as part of its adjudicative function under Section 255, and if so, against whom. Though BSA takes no position on whether the Commission has authority to assess damages against carriers for violations of Section 255, it is clear that the Commission lacks authority to assess damages against persons other than carriers. As a general matter, the Commission is a regulatory body that does not have inherent authority to impose damages; it only has that authority if granted by Congress. Congress gave the Commission authority to award damages in Sections 207 and 208, which provide for damages against common carriers. However, Congress did not choose to rely on those sections to enforce the disability access provisions. Instead, Section 255 contains its own grant of adjudicative authority. By not relying on Sections 207 and 208, and by not incorporating the language on damages found in those sections, Congress again chose a different model

to implement the disability access provisions. Congress wanted the Commission to address concrete complaints, but damages are not to be used as an enforcement tool. Instead, the Commission may issue orders, enforceable by fines or penalties, to resolve meritorious claims.

VI. THE COMMISSION SHOULD DEVELOP GUIDELINES RATHER THAN RULES TO IMPLEMENT SECTION 255.

The Commission has tentatively concluded that it will promulgate regulations to implement Section 255 on the basis of its general rulemaking authority. NPRM at ¶¶ 24-28. BSA believes that such an approach would constitute a grave error because that action is outside the Commission's authority.

The Guidelines developed by the Access Board are the only permissible response to the requirements of Section 255. Adoption of formal rules by the Commission – which necessarily will be inflexible and cumbersome to update – is not a sensible approach to implementing Section 255. The pace of development of accessibility technologies and features is rapid and unpredictable. Information technology in general constantly adapts to user demands and growing technical capabilities. Commission rules under Section 255 would not promote innovation. Regulations that mandate technical specifications are guaranteed to become obsolete in short order, thus creating both a floor and a ceiling on creativity. Moreover, because it is impractical to predict where technological advances will lead, any regulatory attempt to anticipate future developments will distort development efforts and constrain innovation.

In addition to being unwise, Commission rules would be beyond the scope of Commission authority. Section 255(e) states:

> Within 18 months after the date of enactment of the Telecommunications Act of 1996, the Architectural and Transportation Barriers Compliance Board shall develop guidelines for accessibility of telecommunications equipment and customer premises equipment in conjunction with the Commission. The Board shall review and update the guidelines periodically.

This provision establishes that Congress contemplated the question how best to implement Section 255, and expressly recognized the superior benefits of guidelines rather than formal rules in this context. This omission of authority to promulgate rules is noteworthy, because other sections of the Telecommunications Act of 1996, including provisions codified at Sections 251, 254, 259, 260, and 273, expressly direct the Commission to adopt regulations. See 47 U.S.C. §§ 251, 254, 259, 260, 273. Moreover, no other provision in the 1996 Act refers to "guidelines." The Commission must acknowledge that Congress deliberately chose a different regulatory model in writing Section 255.

The Commission has tentatively concluded that its authority to promulgate regulations under Section 255, while absent from that section itself, can be found in general provisions of the Communications Act authorizing the Commission to adopt rules it deems necessary or appropriate in the public interest. NPRM at ¶¶ 52-57. Though it is well established that Section 4(i) of the Communications Act gives the Commission "necessary and proper" authority to conduct business,[2] it is equally well established that the Commission cannot claim that plenary authority as a basis to adopt rules that are not consistent with statutory language and the intent of Congress.[3] Congress made it clear in

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2 ***See, e.g., U.S. v. Storer Broadcasting, 351*** U.S. 192 (1956).

3 ***Iowa Utilities Boardv. FCC, 120*** F.3d ***753*** (8th Cir. 1997), ***cert. granted*** 1998 U.S. LEXIS 659-668 (1998).

writing Section 255 that guidelines were the only administrative step needed to implement the section.

The NPRM argues that because Congress vested authority in the Commission to adjudicate complaints, the Commission also has rulemaking authority. But that is not right as a matter of law or logic. Section 25 5(f) provides that: "The Commission shall have exclusive jurisdiction with respect to any complaint under this section." The Commission cannot bootstrap this express grant of adjudicative authority to overcome the intent of Congress that guidelines are the appropriate means to implement Section 255. The Commission rightly concluded in the NPRM that the Commission should review any such complaints on a case-by-case basis. Carrying out this responsibility does not require inflexible rules or regulations.

In addition to reviewing the statutory language of Section 255 and the structure and context of the 1996 Act, the Commission also should give due consideration to how this language evolved. The NPRM is too quick to dismiss the argument that deletion of language in the Senate bill requiring the Commission to promulgate rules under Section 255 indicates that Congress did not intend to authorize such action. The congressional conferees expressly adopted certain provisions addressing the disability access issue from the Senate bill, specifically, most of subsections (a) through (e). However, the conferees decided to not adopt subsection (g), which would have required the Commission to promulgate regulations to implement the new section within 18 months of enactment. H.R. CONF. REP. No. 458, 104th Cong., 2d Sess. 134-35 (1996). By contrast, in at least five other sections of the 1996 Act, Congress directed the Commission to adopt rules. This legislative history, coupled with the clear statement

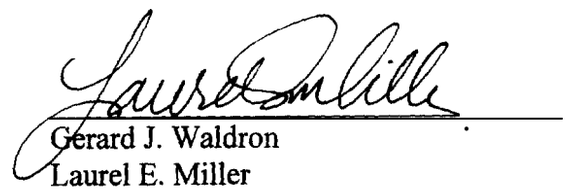
requiring guidelines, illuminates whatever ambiguity the Commission may see in Section 255 and demonstrates the intent of Congress that Section 255 be implemented with guidelines only.

CONCLUSION

For the reasons stated above, we urge the Commission to follow the mandate of Congress and carefully apply Section 255 to telecommunications equipment and services only and not to PC hardware and software, and to adopt guidelines and practical complaint procedures to implement Section 255.

Respectfully submitted,

BUSINESS SOFTWARE ALLIANCE



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